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No. 82-829

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF ALASKA, et al.,
Petitioners,

v.

BOISE CASCADE CORP., et al.,
Respondents.

On A Petition For A Writ Of Certiorari To The United States Court of Appeals For the Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

The petition for a writ of certiorari seeks to overturn a jury verdict for defendants which was reached at the conclusion of a two-month antitrust trial and which was unanimously affirmed by the Court of Appeals. That trial was the culmination of protracted multidistrict litigation. Beginning in 1977, 37 lawsuits were brought in various districts around the country alleging a nationwide conspir-

acy to fix the prices of "fine paper."* (CA-14**). Some of the lawsuits were brought by private parties; others were brought by States, including the ten petitioners herein. All of the cases were consolidated for pretrial proceedings before Judge McGlynn in the Eastern District of Pennsylvania pursuant to the Multidistrict Litigation Act, 28 U.S.C. § 1407.

Each complaint alleged a horizontal price-fixing conspiracy among the manufacturers of fine paper ("mills"). Unlike the other plaintiffs, however, the petitioners also alleged that certain independent distributors of fine paper ("merchants") participated in the conspiracy. The district court had originally planned to sever the claims against the merchants and to try them separately, but the merchants settled with petitioners before trial. (C/A App. 1147-52, 1164-69). In addition, all plaintiffs other than petitioners settled before or during trial.

At the conclusion of the consolidated pretrial proceedings, during which petitioners took some 270 depositions and reviewed nearly two million documents (CA-18), the district court had to decide on trial venue; it could either remand the cases to their various home districts or else transfer them to a single district. Because all of the non-settling respondents were subject to venue in the Eastern District of Pennsylvania, because many of the trial witnesses were located in the district, and because of the obvious advantages of having a consolidated trial before a judge who was already familiar with the litigation, the court decided that all the actions would be tried in the

* The same allegations were also investigated by the Federal Trade Commission and, for two and one-half years, by a federal grand jury. No action was taken by either body. (CA-14).

** The abbreviation "CA" is used to refer to the Court of Appeals decision below. The page numbers refer to the slip opinion, as reproduced in the Appendix to the Petition for Writ of Certiorari.

Eastern District of Pennsylvania "for the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a).

Trial commenced in October 1980, a time that petitioners had proposed. (CA-15). Petitioners introduced the testimony of over 100 witnesses, after which the respondents rested without presenting any evidence. In December 1980, the jury returned a verdict for respondents, finding that there had been no horizontal conspiracy among the mills. The petitioners' allegation of a vertical conspiracy, involving both mills and independent merchants, was not sent to the jury; the court directed a verdict on that subsidiary aspect of the petitioners' case for lack of sufficient probative evidence.

The district court entered judgment on the verdict, and in July 1982 the Court of Appeals unanimously affirmed in all respects. On August 12, 1982, the Third Circuit denied a petition for rehearing in banc.

REASONS WHY CERTIORARI SHOULD BE DENIED

The petition for a writ of certiorari does not present any conflict among the Circuits; it does not raise any substantive issues of antitrust law; and it does not involve any questions of public importance. Petitioners' contentions have been thoroughly reviewed by four judges, and all have agreed that the verdict should be upheld.

I. Because Venue In The Eastern District Of Pennsylvania Was Proper As To Every Respondent Who Went To Trial, The Verdict Should Not Be Overturned Simply Because Other Defendants *Who Had Already Settled* Could Have Objected To The Change Of Venue

Petitioners contend that the jury verdict, rendered after a two-month trial, should be overturned because the trial

was held in the Eastern District of Pennsylvania "for the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). Although venue there was proper as to *every respondent who went to trial*,* petitioners contend that the court was obliged to ignore "the interest of justice" because several of the defendant merchants, *with whom petitioners had already settled*, might have objected to venue in the Eastern District of Pennsylvania. According to petitioners, their ten cases should have been remanded for separate trials in each of their respective home districts.** But this position, if accepted, would lead to "exactly the kind of mischievous consequences against 'the interest of justice' that § 1404(a) was designed to prevent, that is, unnecessary inconvenience and expense to parties, witnesses, and the public." *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 21 (1960) (affirming transfer of *in rem* admiralty claim, as well as *in personam* tort claim, even though venue over the *in rem* claim was not proper in the transferee district).

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* Petitioners are apparently still challenging the finding below that respondent Butler Paper Company was subject to venue in the Eastern District of Pennsylvania. (Petition for Writ of Certiorari, p. 35 n.72). The record amply supports that finding. As the Third Circuit pointed out, "there was evidence in the form of an affidavit from an official of defendant Weyerhaeuser Co. that Butler purchased a large amount of paper from a Weyerhaeuser mill in Eastern Pennsylvania, constituting transaction of business sufficient to establish venue . . . under 15 U.S.C. § 22." (CA-22 n.6). See C/A App. 3878.

** Petitioners have also suggested that the ten cases could have been consolidated in the Northern District of California before a judge who would not have had the benefit of Judge McGlynn's experience in handling the litigation for three years. But petitioners have never demonstrated that all of the defendants, including the independent merchants, would have been subject to venue in the Northern District of California. (See C/A App. 1795-1811).

Petitioners argue that 28 U.S.C. § 1404(a), which authorizes "the transfer of any civil action to any other district where it might have been brought," limits venue to those districts where the lawsuit could have been filed against *all* defendants who were originally sued, including defendants who have already settled or been dismissed. This position, however, has never been accepted by any court.* The generally recognized interpretation of § 1404(a) is that the propriety of a change of venue depends on the parties *who will appear at trial*, not those who were originally sued. For example, when a change of venue is found to be desirable, but the transfer is impermissible as to some defendants, the courts have not hesitated to order separate trials and to transfer one of the trials to the more convenient district.** Indeed, in this very case, the district court had initially planned to have separate trials—one against the mills, the other against the independent merchants. (C/A App. 1147-52, 1164-69). Had the litigation been thus severed, the trial against the mills (respondents) unquestionably could have been transferred to the Eastern District of Pennsylvania. Petitioners ultimately chose to settle with the independent merchants, and consequently there was no need to sever. But, as the Third Circuit explained, that does not affect the validity of the transfer:

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* *See, e.g., Hess Oil Virgin Islands Corp.* v. *UOP, Inc.*, 447 F.Supp. 381 (N.D. Okla. 1978) (plaintiff allowed to seek change of venue after settling with one defendant who could not have been sued in transferee district); *Ackert* v. *Ausman*, 198 F.Supp. 538 (S.D.N.Y. 1961), *mandamus denied sub nom. Ackert* v. *Bryan*, 299 F.2d 65 (2d Cir. 1962) (in granting change of venue, court only considered defendants who had not been dismissed).

** *See, e.g., Wyndham Associates* v. *Bintliff*, 398 F.2d 614, 618 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968); *Anrig* v. *Ringsby United*, 603 F.2d 1319, 1324 (9th Cir. 1978); 15 C. Wright, A Miller & E. Cooper, *Federal Practice & Procedure* § 3845 at 225-26 (1976) (collecting cases).

> "Just as venue defects as to a party whose portion of the action has been severed do not bar transfer of the remainder of the action, . . . a party's settlement of his portion of the action cures any objection to venue in the transferee district with respect to that party." (CA-21) (citations omitted).

Petitioners have offered no good reason for prohibiting an advantageous change of venue—one that promotes "convenience" and "the interest of justice"— merely because defendants who are no longer in the case might have objected to the change. Petitioners assert that Congress intended for venue to be fixed early in the litigation. But that is not the procedure Congress has decreed for multidistrict litigation. The Multidistrict Litigation Act, 28 U.S.C. § 1407, provides that normal venue rules do not apply to "pretrial proceedings."* Only when "all common discovery and other pretrial proceedings have been completed" does the district court decide on trial venue.** By that time, many of the original parties may have settled or been dismissed, and it would defeat the objectives of both § 1404(a) and § 1407 to ignore these developments and remand to an inconvenient forum because of venue considerations relevant only to defendants who are no longer parties. Trial venue affects the litigants who are going to trial, not parties who have settled since being named in the original complaint.

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* Pretrial proceedings can be transferred by the Judicial Panel on Multidistrict Litigation "to any district . . . for the convenience of parties and witnesses" if the transfer "will promote the just and efficient conduct of such actions." § 1407(a). Such a finding was made below. *In re Fine Paper Antitrust Litigation*, 446 F.Supp. 759, 760 (J.P.M.L. 1978); *In re "Fine Paper" Antitrust Litigation*, 453 F.Supp. 118 (J.P.M.L. 1978).

** Rule 11(b), 11(d), Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 28 U.S.C.A. § 1407.

Petitioners rely on *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), but that case has never been interpreted to preclude a change of venue that is proper as to every party going to trial. *Hoffman* held that a defendant cannot, by waiving his venue rights, *unilaterally* expand the range of permissible venues by seeking a § 1404(a) transfer to a district in which plaintiff had no right to bring the suit. "We do not think the phrase 'where it might have been brought' can be interpreted to mean . . . 'where it may now be rebrought, with defendants' consent.'" 363 U.S. at 342-43. In the present case, however, the claims that petitioners took to trial against respondents *could* have been brought in the Eastern District of Pennsylvania; respondents' consent was not required.*

Unlike the interpretation of § 1404(a) that was rejected in *Hoffman* v. *Blaski* as "discriminatory," the interpretation used below treats plaintiffs and defendants equally. If new venues become available as a result of settlements, any party can seek a transfer.** Because the rule followed by the

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* Petitioners contend that *Hoffman* requires the court to examine "the situation which existed when suit was instituted." 363 U.S. at 343. This passage refers to the possibility that, after suit is filed, "the defendants may move their residence . . . [or] begin the transaction of business in some other district." 363 U.S. at 342. That is not the situation here. Each of the respondents was subject to venue in the Eastern District of Pennsylvania *at the time suit was filed.*

** Indeed, as this case demonstrates, the ability to expand the range of permissible venues through settlements rests with the *plaintiffs*. *See also Hess Oil Virgin Islands Corp.* v. *UOP, Inc.*, 447 F.Supp. 381 (N.D. Okla. 1978) (plaintiff brought suit in the only district where all defendants could be sued; then, after settling with one defendant, plaintiff was allowed to seek a change of venue).

district court and the court of appeals is even-handed and sensible, and because no court has ever held to the contrary, certiorari should be denied.

II. Petitioners Were Allowed Sufficient Time To Prepare For Trial

Petitioners contend that the district court abused its discretion in scheduling discovery and setting the trial date. But petitioners were allowed time to take some 270 depositions, and the case went to trial on a date that petitioners had originally proposed. (CA-15, 18). No avenues of discovery were closed to petitioners, and no reason has been given why they could not meet the court's deadlines. Petitioners have utterly failed to meet their burden of demonstrating "actual and substantial prejudice" as a result of the district judge's actions.* The Court of Appeals examined petitioners' complaints carefully, and concluded:

> "After considering all of appellants' contentions and examining the 16-volume appendix they have supplied to this court, we are not persuaded that the pretrial rulings of the district court prejudiced the preparation or presentation of their case. . . . Our independent review of the record persuades us that the trial court in this case was firm but fair. It deferred the trial date from January 2 to June 16 to October 6, 1980, and it accommodated appellants' requests whenever feasible." (CA-18-19).

Much of petitioners' complaint relates to discovery deadlines *that were subsequently postponed at petitioners' request*. The trial judge allowed discovery on the merits to commence in February 1979 and initially scheduled trial for

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* CA-18, *quoting Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F.2d 1096, 1105 (5th Cir. 1972).

Petitioners do not dispute that this is the proper standard of review.

January 1980. (C/A App. 866). In the face of this trial date, petitioners' only discovery consisted of document requests and interrogatories. When they requested more time for discovery in January 1980, the trial date was put off and a May 30th discovery cut-off date was set. When petitioners failed to complete discovery by that deadline—a deadline that all of the private plaintiffs were able to meet—the court allowed petitioners to take still more depositions. In sum, petitioners had ample opportunity to take necessary discovery.

Petitioners' complaint about the trial date is equally unfounded. The trial began in October 1980, a time that petitioners had originally proposed. (CA-15). Although the court initially set the trial for January 2, 1980, at petitioners' request the district court "deferred the trial date . . . to June 16 [and then] to October 6." (CA-19). Petitioners' counsel stated in June that he could "accomplish everything" by September 1. (CA-18 n.4). Clearly, therefore, the district judge did not abuse his discretion by commencing trial on October 6.

III. Petitioners' Other Challenges Are Without Merit

Petitioners were allowed to go to the jury on their principal allegation that there was a nationwide price-fixing conspiracy involving fine paper manufacturers ("mills"). The jury found that no such conspiracy existed. Petitioners also alleged a broader national conspiracy involving *both* mills *and* independent "merchants" (*i.e.*, distributors). The district court directed a verdict on this aspect of the case, finding that petitioners had failed to present sufficient probative evidence of such a conspiracy. On appeal, petitioners argued that the district court had not given them the full benefit of their evidence, but the Third Circuit disagreed:

> "Plaintiffs alleged a nationwide conspiracy between mills and independent merchants. Viewed in the light most favorable to appellants, the evidence upon which they rely in their challenge to the directed verdict *involves only communication among merchants relating to retail prices.* Like the district court, we will not permit the jury to infer from communication at a lower level the existence of a conspiracy at a higher level . . . [T]he court refused to submit to the jury evidence which at best was probative of an alleged conspiracy *unrelated to the conspiracy whose existence was at issue.*" (CA-27) (emphasis added).

Petitioners now ask this Court to sift through the evidence and determine whether the partial directed verdict was warranted. Yet, as the Third Circuit pointed out, the only evidence offered to show a nationwide conspiracy among mills and merchants involved communications by *merchants* relating to the *retail prices* charged by merchants, not the wholesale prices charged by the mills, or the bid prices paid by the petitioners. (CA-27). Petitioners place special emphasis on a letter sent to one mill by its wholly-owned subsidiary. That letter only referred to retail prices charged by merchants and it did not mention, either directly or indirectly, any of the other defendant mills or the prices they charged.* Four judges have reviewed this evidence; all have concluded that it was insufficient to support a finding that there was a nationwide conspiracy among mills and merchants, a conclusion that is consistent with the jury's finding that there was no conspiracy among mills.

In any event, as the Court of Appeals pointed out, the petitioners were not prejudiced by this ruling because they

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* Because there was no evidence to connect this isolated event to the alleged nationwide conspiracy, the Third Circuit found it "unrelated to the conspiracy whose existence was in issue," and therefore concluded that petitioners' reliance on *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), was misplaced. (CA-26-27).

never paid the retail prices that were allegedly fixed by the merchants.* "Appellants purchased paper not at retail but only on the basis of bids. We do not perceive any prejudice resulting from the entry of the [partial] directed verdict." (CA-27). Because the defendant mills did not sell at retail and the plaintiff States did not pay retail prices, petitioners had no right to go to the jury with evidence relating solely to an alleged conspiracy to fix retail prices.**

Petitioners also challenge the denial of class certification and, with respect to one petitioner, the exclusion of certain damage evidence as a sanction for disobeying a discovery order. Neither challenge goes to the validity of the verdict, and both are thoroughly answered in the Third Circuit's opinion. (CA-28-31).

CONCLUSION

The petition for a writ of certiorari should be denied.

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* Petitioners did not purchase fine paper from the mills; they only purchased from merchants.

** Petitioners also assert that the district court excluded certain documents as a result of the directed verdict. *But petitioners made no record of any documents being excluded from evidence on that basis.*

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APPENDIX: RULE 28.1 LISTING

Pursuant to Supreme Court Rule 28.1, respondents submit the following list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondents. In accordance with the instructions of the Clerk, only public-traded corporations are listed. Some of the corporations listed below may not be "affiliates" or, in the case of some foreign corporations, they may not be "publicly held," as those terms are used by the Securities and Exchange Commission.

Boise Cascade Corporation

None

Butler Paper Company

Great Northern Nekoosa Corporation

Champion International Corporation

Weldwood of Canada Ltd.

Crown Zellerbach Corporation

Crown Zellerbach Canada Ltd.

Great Northern Nekoosa Corporation

None

Hammermill Paper Company

Gulf & Western Industries, Inc.

International Paper Company

None

Kimberly-Clark Corporation

Kimberly-Clark de Mexico, S.A. de C.V.
Carlton Paper Corporation Ltd.

The Mead Corporation

British Columbia Forest Products Limited

Scott Paper Company

Scott Paper Limited
Cia. Industrial de San Cristobal, S.A.
Papelas Scott de Columbia, S.A.
Celulosa Jujuy, S.A.
Gureola-Scott, S.A.
Brascan Limited

Weyerhaeuser Company

None